(3)

No. 90-424

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

J.J. BLONIEN & ASSOCIATES, INC. and
CITY OF WEST ALLIS,

Petitioners,

v.

COMMUNITY NEWSPAPERS, INC. and
ELSA R. SCHUPMEHL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS DISTRICT I

CAROLYN GNAEDINGER
Counsel of Record
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 277-5000

RICHARD C. GAD
RICHARD C. GAD, S.C.
1139 South Knapp Street
Milwaukee, WI 53202
(414) 273-1130
Counsel for Community
Newspapers, Inc. and
Elsa R. Schupmehl

Dated October 5, 1990

QUESTION PRESENTED

Wisconsin law mandates that municipalities publish notice of matters of local governance in a newspaper meeting certain statutory eligibility requirements. The Wisconsin courts ruled that only newspapers which actually charge not less than fifty percent (50%) of their readers a fee to receive copies are permitted by statute to print municipal notices.

The question presented is whether, under the Fourteenth Amendment, the State of Wisconsin may constitutionally prohibit payment by a municipality for publication of legal notices in a newspaper which does not charge at least fifty percent (50%) of its readers a subscription fee.

LIST OF PARTIES

The respondent, Community Newspapers, Inc., is a Wisconsin corporation and wholly-owned subsidiary of SunMedia Corp., a closely-held Delaware corporation. The respondent, Elsa R. Schupmehl, is an adult resident of Wisconsin and taxpayer of the City of West Allis, Wisconsin.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

a strict scrutiny analysis. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17, 29 (1973); statutes having different effects on the wealthy and the poor are not, on that account alone, subject to strict equal protection scrutiny, *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450,458 (1988). Therefore, even if there are in fact citizens unable to afford the paid circulation newspaper, which has not been shown here, Petitioners must nevertheless identify impermissible interference with the exercise of a "fundamental right" in order to invoke strict scrutiny.

2. Actual Physical Notice of Municipal Matters Is Not a Fundamental Right Triggering Strict Scrutiny Analysis, Particularly Where Alternative Devices To Obtain Notice Are Available.

Petitioners assert that there exists an individual fundamental right protected by the United States Constitution requiring that a municipality must provide free of charge actual notice to every citizen of every publication of laws, ordinances, resolutions, financial statements, budgets and proceedings, and every notice and certificate of election, facsimile ballot, referenda, notice of public hearing before a governmental body, and notice of meetings of private and public bodies required by law. Petitioners cite no authority for this proposition. Petitioners then argue that this "fundamental right" is violated when notice is to be published only in a paid circulation newspaper, invoking a "strict scrutiny" analysis of § 985.03, Wis. Stats., founded on claimed equal protection discrimination based on wealth. Such an analysis is unnecessary and inappropriate.

Petitioners cite no case which holds that actual physical notice of governmental activities, including notices of election, is a "fundamental right" under the Constitution. Nor do Petitioners cite any case which holds that lack of actual physical notice interferes with any fundamental right, such as the right to vote, to assemble, or to petition the government. Instead, the Petition cites a number of cases which struck down laws which *absolutely prohibited* someone from voting or running for office, unless the person paid a fee, or was a property owner. Thus, in *Bullock v.*

Carter, 405 U.S. 134, 137 (1972), payment of a filing fee was "an absolute requisite" to a candidate's participation in a primary election. In *Cipriano v. City of Houma*, 395 U.S. 701, 703 (1969), plaintiff was prevented from voting "solely because he was not a property owner." In *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 206 (1970), "only otherwise qualified voters who are also real property taxpayers were permitted to vote" on certain bond issues. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966), involved a poll tax system which "excludes those unable to pay a fee to vote or who fail to pay." *Hill v. Stone*, 421 U.S. 289, 293 (1975), involved a law which restricted the right to vote to persons who rendered property for taxation in the election district. *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626, n.6. (1969), involved legislation which limited the right to vote to those who owned or leased real property or were parents of children enrolled in school, and was thus "an absolute denial of the franchise." *Lubin v. Panish*, 415 U.S. 709, 718 (1974) involved denial of nomination papers to file as a political candidate "solely on the basis of ability to pay a fixed fee without providing any alternative means . . .". *Turner v. Fouche*, 396 U.S. 346 (1970) and *Woodward v. City of Deerfield Beach*, 538 F.2d 1081 (5th Cir. 1976) struck down legislation which required candidates for office to be freeholders.

Petitioners ask this Court to extend these case holdings substantially beyond absolute preclusion of the right to vote or to hold office, so as to cover incidental burdens, not even directly on the right to vote, but rather merely on obtaining knowledge relative to municipal affairs. This Court has held that strict scrutiny analysis does not extend so far.

In *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802 (1969), jail inmates who could not readily appear at the polls because they were unable to post bail challenged the constitutionality of an Illinois statute which did not permit them to obtain absentee ballots. They argued that the absentee ballot provisions violated the Equal Protection Clause. This Court held that a strict scrutiny analysis was *not* required because the distinctions made by the absentee provisions were not drawn on the basis of race or wealth and, secondly, there was nothing in the record to indicate that the statute had an impact on the prisoners' ability to exercise the fundamental right to vote. This Court stated:

> It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, *the absentee statutes*, which are designed to make voting more available to some groups who cannot easily get to the polls, *do not themselves deny appellants the exercise of the franchise*; nor, indeed, does Illinois' Election Code so operate as a whole, for the State's statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants. [citing statute]. *Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting. We are then left with the more traditional standards for evaluating appellants' equal protection claims.*

Id. at 807-808, emphasis added. Thus, the Court stated, the record "is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." Id. at 808, n.6.

In *McDonald*, this Court rejected the claim of those who said that because they could not afford to post bail, they were being denied their right to vote solely because of indigency:

> Appellants claim secondly that to the extent that they cannot afford the posted bail, they are being denied their right to vote solely because of their indigency, contrary to *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Since there is nothing in the record to show that appellants are in fact absolutely prohibited from voting by the State, *see* n. 6, supra, we need not reach these two contentions.

Id. at 808, footnote 7.

The *McDonald* requirement of an absolute prohibition from voting solely because of indigency in order to trigger strict scrutiny analysis was specifically approved, or distinguished, in cases cited by Petitioners, *i.e.*, *Bullock v. Carter, supra*, 405 U.S. at 143, *Hill v. Stone, supra*, 421 U.S. at 300, and *Kramer, supra*, 395 U.S. at 626 n.6. In *Bullock v. Carter, supra* at 134, the Court said:

> Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review. *McDonald v. Board of Election*, 394 U.S. 802 (1969).

Similarly here, the operation of § 985.03, Wis. Stats., does not absolutely prohibit or preclude anyone from voting, or assembling, or petitioning their government because of indigency. In *McDonald*, the court said the plaintiffs did not prove they were absolutely prohibited from voting, even though they were locked up in jail. Here, the lack of a free newspaper containing legal notices obviously does not absolutely prohibit anyone from voting, assembling, or petitioning their government. Moreover, there is no proof that the paid circulation newspaper is not available for perusal by the persons in the municipality, if any, who are too poor to pay for a subscription, or that the City could not make copies of the publication available at City Hall, or that the publisher would not make a copy available for review by indigent persons, or that the paper is not available for perusal in the local library. Nor is there any proof that notices are not posted, at City Hall, or otherwise. The availability of alternative devices to obtain the desired benefit precludes strict scrutiny analysis. *McDonald, supra*, 394 U.S. at 808 n.6, *United States v. Kras*, 409 U.S. 434, 446 (1973).

As stated in *Selph v. Council of City of Los Angeles*, 390 F. Supp. 58 (C.D. Cal. 1975), the equal protection clause permits some burdens upon the right to vote in a manner equal with other voters. The Fourteenth Amendment forbids conduct which results in a "total denial of the right to vote on the basis of a class distinction or requirement, or when classes of voters are treated differently." Id. at 62. In *Selph*, the court held that where the right to vote was not totally denied to a physically handicapped person, and reasonable alternatives were provided to the person who found his

polling place physically inaccessible, the traditional standard of rational relationship to a legitimate state objective, rather than strict scrutiny, was the proper analysis. Id. at 62. So here, too, the right to vote, assemble, and petition the government is not absolutely denied by the operation of § 985.03. Nor is there here any proof that alternative methods of obtaining such notice as might impact on a person's decision to vote, assemble or petition the government were absolutely unavailable. The traditional standard of rational relationship analysis is therefore appropriate in testing the constitutionality of § 985.03. *See Lyng v. International Union, UAW*, 485 U.S. 360 (1988), *Lyng v. Castillo*, 477 U.S. 635 (1986).

C. Existing Case Law Makes It Plain That there Is a Rational Basis for § 985.03, Wis. Stats., Sufficient To Validate The Statute.

Any reasonable basis for a classification will validate a statute. A statute will be declared violative of equal protection only when the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts, or a proper state policy. *Kadrmas, supra*, 487 U.S. at 462-465. It is the obligation of the court to locate or to construct a rationale that might have influenced the legislature and that reasonably upholds the legislative determination. *McDonald, supra* at 809.

Many states have paid circulation or paid subscriber statutes restricting newspapers qualified to publish official notices. *See, e.g., In Re Carson Bulletin v. City of Carson*, 85 Cal. App. 3d 785, 149 Cal. Rptr. 764 (Cal. Ct. App. 1978); *In Re La Opinion v. Los Angeles Newspaper Service Bureau*, 10 Cal. App. 3d 1012, 89 Cal. Rptr. 404 (Cal. Ct. App. 1970); *Great Southern Media, Inc. v. McDowell County*, 304 N.C. 549, 284 S.E.2d 457 (1981); *Jones v. Percy*, 237 N.C. 239, 74 S.E.2d 700 (1953); *Williams v. Athens Newspapers, Inc.*, 241 Ga. 274, 244 S.E.2d 822 (1978); *East Suburban Press, Inc. v. Township of Penn Hills*, 40 Pa. Commw. 438, 397 A.2d 1263 (1979); *In Re Avila*, 206 N.J. Super. 61, 501 A.2d 1018 (App. Div. 1985); *Southeastern Newspapers Corporation v. Griffin*, 245 Ga. 748, 267 S.E.2d 21 (1980). Moreover, there has been a "paid circulation" requirement for second class mailing privileges dating back to 1879. *See The Enterprise, Inc. v. United States*, 833 F.2d 1216, esp. 1219-1222 (6th Cir. 1987).

It would be eminently reasonable for the Wisconsin Legislature to conclude that one is more likely to read a publication if one has paid for it than if it simply appears uninvited at one's door. *See In Re Avila*, 206 N.J.Super. 61, 501 A.2d 1018, 1019 (App. Div. 1985).

It would also be reasonable for the Wisconsin Legislature to conclude that a 50 percent bona fide paid circulation requirement struck the proper balance among the competing considerations of circulation to a significant number of persons, confidence that the publication in which the notices are printed will in fact be read by the recipients, and allowance for competition in publishing legal notices by requiring a low minimum number of subscribers.

The Legislature might also reasonably conclude that if a periodical is purchased by a significant percentage of its readers, it more likely will in fact be a "newspaper" as required by the statute and not merely an advertisement circular with a few "news" items included for the purpose of claiming newspaper status. The paid circulation requirement thus enables municipalities to avoid potentially difficult First Amendment problems associated with assessing a publication's content in determining whether a publication meets the definition of a "newspaper" for purposes of § 985.03(c). For all these reasons, § 985.03 easily passes muster under the required rational relationship test.

Petitioners argue that § 985.03, Wis. Stats., is anti-competitive. [Pet. p. 31] Petitioners' position is in fact more anti-competitive than the statute, for it would require at a minimum that the periodical with the greatest number of copies printed must always necessarily be given the contract to publish legal notices — if the Court adopts the Petitioners' assumption that the greater the number of copies circulated, the more likely it is that actual notice will be given, with blanket circulation being constitutionally required.

It is common sense that with more space devoted to advertisements, and less effort put into gathering and reporting news, the more cheaply a periodical can be circulated, so the periodical may submit a lower bid to print legal notices. Therefore,

free blanket circulation publications would never have any competition for the publication of legal notices except from like periodicals with even less news content (making it less likely that the legal notices will be found or read among the collection of advertisements).

The low subscriber thresholds in the statute of 1,000 subscriber copies for first and second class cities, and 300 subscriber copies for third and fourth class cities, were obviously designed to encourage competition, while safeguarding actual readership through the paid circulation requirement. Petitioners' unstated contention is that the largest circulation newspaper should have a monopoly because of the number of copies it distributes. The statute allows for the potential of competition among paid circulation publications, even if they haven't the largest circulation in the area. Petitioners' position would allow for none.

CONCLUSION

For all the foregoing reasons, facts and authorities this Court should deny the Petition for Writ of Certiorari. If reviewed, the decision of the Wisconsin court should be summarily affirmed.

Dated this 5th day of October, 1990.

Respectfully submitted.

By **Carolyn Gnaedinger**
Counsel of Record

Attorney for
Community Newspapers, Inc.
and Elsa R. Schupmehl

QUARLES & BRADY
411 East Wisconsin Avenue
Milwaukee WI 53202-4497
(414) 277-5000

Richard C. Gad, Esq.
RICHARD C. GAD, S.C.
1139 East Knapp Street
Milwaukee WI 53202
(414) 273-1130